

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

699

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,110

UNITED STATES OF AMERICA,

vs.

ROBERT L. MC MILLAN,

Appellant.

Appeal in Forma Pauperis from a Judgment of Conviction
of the United States District Court for the District of
Columbia for Violation of Sections 1801A, 2901, 502 and
3204, Title 22, District of Columbia Code

United States Court of Appeals
for the District of Columbia Circuit

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Can a conviction for carrying a gun be allowed to stand where the defendant does not have any gun in his possession, concealed or otherwise?

2. Can a conviction under any one of the five counts in a five-count indictment be allowed to stand where the Government promiscuously allows a gun charge against the defendant to stand knowing that it may prejudice the jury against the defendant on all counts?

3. Should convictions be allowed to stand where the Government sends into the jury room a copy of an indictment where the defendant is not afforded the opportunity to send in his answer to each specific charge in the indictment?

4. Should convictions be allowed to stand where a joint defendant is placed into a prejudicial position and a fair trial prevented by his having to have his case jointly tried with an AWOL serviceman?

5. Should convictions be allowed to stand which place the Government in the position of giving protection to those engaged in admitted illegal activities?

6. Should convictions be allowed to stand where the Government purposely seeks to destroy an alibi witness in closing argument by stating "He (meaning McMillan) presented

a lady here in the courtroom who is asleep in the courtroom
right now"?

7. Should convictions be allowed to stand where there
is a confusion as to identification? *

* This case has not previously been before this Court.

References & Rulings - none

JURISDICTIONAL STATEMENT

On June 12, 1968 Robert L. McMillan was indicted in the United States District Court for the District of Columbia on five counts:

Count 1 - Violation of D. C. Code 22-1301(a),

First Degree Burglary

Count 2 - Violation of D. C. Code 22-2901,

Robbery

Count 3 - Violation of D. C. Code 22-502,

Assault with Dangerous Weapon

(on Haywood Smith)

Count 4 - Violation of D. C. Code 22-502,

Assault with Dangerous Weapon

(on Bettie L. Powell)

Count 5 - Violation of D. C. Code 22-3204,

Carrying Dangerous Weapon

On June 28, 1968 he pleaded not guilty to all counts.

Following trial of the case on January 29, 1969 to February 4, 1969, he was convicted on all five counts and was sentenced by the Court to 5 to 15 years on Count 1; 5 to 15 years on Count 2; 3 to 9 years on Count 3; 3 to 9 years on Count 4; and, 1 year on Count 5, all concurrent so that defendant, Robert L. McMillan, will serve 5 to 15 years.

The United States District Court for the District of Columbia had jurisdiction as provided by D. C. Code 11-306 and 11-521.

The United States Court of Appeals for the District of Columbia Circuit has jurisdiction of this appeal as provided by 28 U.S.C., Secs. 1291 and 1294.

STATEMENT OF THE CASE

Appellant, Robert L. McMillan, was named in a five-count indictment filed in the United States District Court for the District of Columbia on June 12, 1968, charging him with having committed the offenses of first degree burglary, robbery, two counts of assault with a dangerous weapon and carrying a dangerous weapon.

The first count alleged that on or about May 12, 1968 appellant "entered the dwelling of Haywood Smith, with intent to steal property of another, while said Haywood Smith was present in said dwelling."

The second count alleged that on May 12, 1968 appellant "by force and violence and against resistance and by putting in fear, stole and took from the person and from the immediate actual possession of Haywood Smith, property of Haywood Smith, of the value of about \$153.00 consisting of one pistol of the value of \$40.00, two half pints of the value of \$3.00 and \$110.00 in money."

The third count alleged that on or about May 12, 1968 appellant "assaulted Haywood Smith with a dangerous weapon, that is a knife."

The fourth count alleged that on or about May 12, 1968

appellant "assaulted Bettie L. Powell with a dangerous weapon, that is a pistol."

The fifth count alleged that on or about May 12, 1968 the appellant "did carry, openly and concealed, on or about his person a dangerous weapon, capable of being concealed, that is, a pistol without a license therefor issued as provided by law."

The case came on for trial on January 29, 1969. The Government's case consisted of the following:

Haywood Smith, 1002 K Street, N. W., testified that he was a bootlegger (Tr. 37 and 89) and that McMillan came to his place at 11 P. M. on May 11, 1968 (Tr. 39) and bought a half pint and left and that McMillan returned at 1 A. M. on May 12, 1968 and bought another bottle and left (Tr. 41). That McMillan returned again at 3 A. M. on May 12, 1968, bought another bottle and left. That McMillan came back a fourth time at approximately 6 A. M. on May 12, 1968, knocked on the door, pushed it open and walked right in. That there were two other people who came in with McMillan. That McMillan ordered two half pints of whiskey and Bettie L. Powell left the room to get same. When she returned, McMillan put a knife to Haywood Smith's neck stating give me your money or I'll kill you (Tr. 45, 100 and 101).

There was taken from Haywood Smith a .25 automatic and approximately \$80.00 (Tr. 101 and 102). That Shumate held

Bettie L. Powell by twisting her arm. That two shots were fired from the pistol but they were not aimed to hit anyone (Tr. 103 and 104). McMillan had on a light trench coat. Shumate was ordinarily dressed (Tr. 43). That McMillan and Shumate left going toward the bus station (Tr. 47). That Haywood Smith reported the event to Tisdale. That Tisdale reported to Haywood Smith that he saw the two people who had robbed Haywood Smith (Tr. 50) and that Haywood Smith, as a result of this information, called the police department (Tr. 50). That there was no light outside of premises 1002 K Street, N. W. (Tr. 54). That there was a 25-watt light in the hall, a 60-watt light in the bedroom and 100-watt bulb in the kitchen (Tr. 55 and 57). That he was robbed by two white men and one colored man (Tr. 61).

Sergeant C. R. Waters from the D. C. Jail presented certain personal effects of Shumate and McMillan.

Betty Roberson of 1002 K Street, N. W. testified she heard two shots in the early hours of May 12, 1968 and saw someone leaving the premises wearing a white trench coat (Tr. 119 and 120).

Bettie L. Powell of 1002 K Street, N. W. testified that on May 12, 1968 two fellows, identifying Shumate and McMillan, held a knife to Mr. Smith's throat, took a gun from him and robbed

them at about ten minutes to 6 A. M. on May 12, 1968 (Tr. 123 and 144). That there were two colored men and one white man involved at this time, one of whom held her arms behind her (Tr. 126). That Shumate and McMillan first came to the premises at 11:30 P. M. on May 11, 1968. That they came back again at 2:30 A. M. on May 12, 1968, a third time at 4:30 A. M. and a fourth time at ten minutes to 6 A. M. (Tr. 131, 141 and 142). That there was a 75-watt light in the bedroom and a 25-watt bulb in the hall and a 70-watt bulb in the kitchen (Tr. 134). That the wine and liquor for the boodeg operation was kept in the kitchen (Tr. 135). That McMillan pointed a gun at Haywood Smith and fired two shots above his head (Tr. 145). That there was an overhead light, bedroom light and kitchen light (Tr. 146).

William Tisdale, 1006 Massachusetts Avenue, N. W., at 8 A. M. on May 12, 1968 was told of a robbery by Haywood Smith. That after 1 P. M. he left 806 K Street, N. W. and told Haywood Smith that the two men that had robbed him were at 806 K Street, N. W. in a commotion (Tr. 150). That Haywood Smith told him that he had been robbed by two white males and one Negro male.

Officer Jimmie A. Sherl, Metropolitan Police Department, testified he received a run for a disorder at the Safeway Restaurant

at 805 K Street, D.C. at 12:48 P. M. (Tr. 172) and produced a rerun of the tapes of dispatches as of May 12, 1968 which had a listed time of 12:48 P. M. of scout car 17 being sent to 805 K Street, D.C. for possible robbery suspect (Tr. 412).

That McMillan and Shumate were on the premises and that McMillan stated that he had laid his trench coat on the bar stool, went out to pay the taxicab and when he came back, his billfold with \$100.00 and a gun had been stolen (Tr. 173).

Haywood Smith identified Shumate and McMillan as parties who had robbed him the previous evening (Tr. 176). That nothing was found on the person of Robert McMillan, no billfold or anything except clothing (Tr. 180). That McMillan had no permit to carry a gun (Tr. 182 and 184). That counsel for Shumate and McMillan made a motion for acquittal (Tr. 184 and 186). The motion of each defendant was denied (Tr. 186).

On May 12, 1968 that neither Shumate nor McMillan were wearing a yellow shirt when he saw them in the Central Cellblock and that neither one of the appellants were wearing the shirt identified as Defendant's Exhibit No. 3 in evidence. That McMillan was not wearing a yellow shirt (Tr. 417). That McMillan at the preliminary hearing on Monday, May 13, 1968, had a trench coat and a light blue v-neck with a dark blue outer clothing and a Banlon shirt (Tr. 421).

Peter S. Paterno, Jr., Metropolitan Police Department, testified that on May 12, 1968 at 12:48 A. M. received a radio run for disorderlies at the Safeway Lunch, 805 K Street, N. W. That on the premises he observed Shumate and McMillan looking around on the floor and McMillan stated that approximately \$100.00 in bills and a .25 automatic had been stolen from his trench coat which he had left on a bar stool when he left the establishment to pay a cab fare outside of it (Tr. 160 and 166). That McMillan stated he was carrying the gun for his protection and refused to make a report. That Haywood Smith approached and identified McMillan and Shumate as having robbed him earlier in the morning (Tr. 162 and 163). He identified Shumate as wearing a black short-sleeved Banlon shirt with a bright green v-neck and green pants (Tr. 166). He stated McMillan had a white trench coat he was carrying on his arm and wore a Banlon shirt with a v-neck and grey pants (Tr. 168).

Robert Petrie, United States Army, Fort Belvoir, Virginia, testified that Shumate left Fort Belvoir on April 16, 1968 and had not returned since (Tr. 404).

Allen F. Richards of the Metropolitan Police Department testified that on May 12, 1968 he was booking sergeant in the cell-block, No. 1 Precinct. That he booked William Arnold Shumate

at 1:40 P. M. on May 12, 1968 and booked Bobby Lee McMillan at 1:42 P. M. on May 12, 1968 (Tr. 403).

Jessie Curtis, employee of the Department of Corrections, Lorton, Virginia, produced a Trailways bus ticket which was marked Defendant's Exhibit Number 3-B (Tr. 196) and a pair of green trousers and a yellow shirt. He identified said property as being under the name of Shumate (Tr. 201).

Robert L. McMillan advised the Court that he would not testify (Tr. 190).

William A. Shumate, Private, United States Army, Fort Lee, Virginia, testified that on May 11, 1968 he left Burlington, North Carolina to go to York, Pennsylvania and arrived at Washington, D. C. at 2 A. M. on May 12, 1968 at the Trailways Bus Station. That he was wearing a yellow shirt and green pants (Tr. 217). That he went to the Greyhound Bus Terminal at 2:30 A. M. That he slept until about 6:30 or 7 A. M. on May 12, 1968 and met McMillan at about 8 A. M. (Tr. 221 and 227). That around 9:30 A. M. he and McMillan went to get a beer at the Safeway Restaurant. That they took a cab there and McMillan left his trench coat on the stool and they both went to pay the cab driver and upon going back into the Safeway Restaurant, McMillan's wallet was missing. Shumate denied ever entering

1002 K Street, N. W. on May 11th or May 12th, 1968 (Tr. 224).

He denied ever having seen Smith or Bettie L. Powell before the trial (Tr. 225). He stated he was on 30-days' leave. Counsel for Shumate stated he was AWOL and such matters should not be introduced into the trial as it would affect the jury determination (Tr. 231 and 232). On cross-examination he stated that he did not have a pass or travel orders from the United States Army and that when questioned (by the United States District Attorney) "What did you do, walk off the post? A. Yes." (Tr. 238).

That he left the post not in uniform (Tr. 239). That he got to Washington, D. C. at 2 o'clock in the morning and had to make a transfer to the Greyhound bus which was to leave at 10 or 10:30 A. M. in the morning (Tr. 250). That he met McMillan at 8 A. M. on May 12, 1968 (Tr. 251). That McMillan did not tell him that a .25 automatic was missing (Tr. 257). That he did not hear either inside or outside McMillan tell police that \$100.00 was taken and also an automatic (Tr. 256 and 259).

That McMillan refused to make a complaint about the money in the wallet to the officers (Tr. 262). He testified that the v-type Banlon shirt (Government's Exhibit No. 2 for identification) was McMillan's shirt (Tr. 269). That McMillan had on a pair of grey dress pants (Tr. 281). That McMillan swapped shirts

with him in the cellblock (Tr. 282 and 283). That in his opinion he was arrested at approximately 10 A. M.

On cross-examination by the prosecution, Chumate was asked the question "Incidentally, what did you do with the fatigues that you said you were wearing when you left Belvoir? I guess they are still at my mother's house." (Tr. 290)

Louise D. Campbell of 711 Commercial Street, Fayetteville, North Carolina, testified that Robert McMillan was in Fayetteville, North Carolina at the Jazzarama Supper Club until 12:20 A. M. on May 12, 1968. That she went to the bus terminal with Robert McMillan when he got his ticket. That the bus that he boarded was scheduled to leave at 1:15 A. M. on May 12, 1968 and that she saw him board this bus at 1:15 A. M. on May 12, 1968 and that she saw the sign on the bus saying destination New York Express (Tr. 298, 299 and 320). That she was certain that it was Sunday morning, May 12, 1969, when Robert McMillan got on the bus at 1:15 A. M. (Tr. 300 301). That she went from the Jazzarama Supper Club to the bus station with Robert McMillan (Tr. 322), having left the supper club at 12:30 A. M. on March 12, 1968.

Fred Mitchell, manager of the Continental Trailways Terminal, Washington, D. C., testified that the bus leaving

Fayetteville at 1:15 A. M. would arrive in Washington, D. C. at 8:25 A. M. (Tr. 327). That such schedules were in effect on May 12, 1968 (Tr. 333).

At the conclusion of the Government's case, appellant, McMillan, moved for a judgment of acquittal (Tr. 339).

That counsel for appellant, McMillan, made a motion for a judgment of acquittal at the conclusion of all evidence which was denied (Tr. 422). That counsel for McMillan further moved for a dismissal of Count No. 5 on the basis that the concealed weapon was not an operative weapon (Tr. 422) and that the gun has not been recovered. Counsel for the appellant, McMillan, stated that there was no corroboration as to the gun charge (Tr. 424).

The prosecution in its closing argument refers to a .25 automatic as being taken from the pocket of McMillan (Tr. 433) and related that Shumate did not recall when he left Fort Belvoir to go home and that he had no pass (Tr. 436). That "He (meaning McMillan) presented a lady here in the courtroom who is asleep in the courtroom right now." (Tr. 441)

The prosecution further stated that McMillan had no permit to carry a gun (Tr. 470) and that McMillan filed no complaint and questioned the members of the jury as to why he did not (Tr. 470).

The Court charged the jury on carrying a dangerous weapon without a license (Tr. 492 and 493).

The jury convicted Robert L. McMillan on all five counts.

STATUTORY PROVISIONS INVOLVE

22 D. C. Code, Sec. 1801(a). (First Degree Burglary)

“Whoever shall, either in the nighttime or in the daytime, break and enter, or enter without breaking, any dwelling, or room used as a sleeping apartment in any building, with intent to break and carry away any part thereof, or any fixture or other thing attached to or connected thereto or to commit any criminal offense, shall, if any person is in any part of such dwelling or sleeping apartment at the time of such breaking and entering, or entering without breaking, be guilty of burglary in the first degree. Burglary in the first degree shall be punished by imprisonment for not less than five years nor more than thirty years.”

22 D. C. Code, Sec. 2901. (Robbery)

“Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, sec. 810.)”

22 D. C. Code, Sec. 502. (Assault with Dangerous Weapon)

"Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, sec. 804.)"

22 D. C. Code, Sec. 3204. (Carrying Dangerous Weapon)

"No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years. (July 8, 1932, 47 Stat. 651, ch. 465, sec. 4; Nov. 4, 1943, 57 Stat. 586, ch. 296; Aug. 4, 1947, 61 Stat. 743, ch. 469; June 23, 1953, 67 Stat. 94, ch. 159, sec. 204(c).)"

STATEMENT OF POINTS

1. The Trial Court erred in overruling appellant's motion for a directed verdict of acquittal on the charge of carrying a concealed weapon as there was never established whether or not the appellant had a gun; and whether or not it was loaded; and whether or not it was concealed on his person.

2. A copy of the indictment should not have been sent to the jury room.

3. That the appellant should have been given a trial separate and apart from Shumate, an AWOL serviceman.

4. That the United States Government should not place itself in the position of giving police protection to illegal activities.

5. The prosecution improperly referred to an alibi witness.

6. There was insufficient evidence by way of identification to establish beyond a reasonable doubt the appellant was the responsible party.

7. Burglary was not established as the party in the dwelling was an invitee.

SUMMARY OF THE ARGUMENT

Appellant was found guilty of burglary, robbery, two counts of assault with a dangerous weapon and carrying a concealed weapon.

No evidence was presented by anyone at the trial which established the appellant was carrying a dangerous weapon on his person.

The Government improperly sent a copy of the indictment into the jury room.

That the United States Government should not give protection to those engaged in admitted illegal activities.

That prejudicial error was committed by the prosecution when it referred to the alibi witness as being asleep in the courtroom.

That there was insufficient evidence to establish burglary as the appellant was an invitee.

That there was an inadequate identification of the appellant.

ARGUMENT

I

A CONVICTION OF CARRYING A DANGEROUS WEAPON CANNOT BE ALLOWED TO STAND WHERE THERE IS NO CORPUS DELICTI

The appellant was charged by indictment with carrying a dangerous weapon. The Government never at any time produced a weapon and further, no evidence was ever produced to show that the weapon was loaded or unloaded.

The evidence in the trial did establish that there was some conversation between, perhaps, the appellant and one police officer, that there may have been removed from the trench coat of the appellant a gun. This evidence is wholly unreliable and is not sufficient for even the return of an indictment and should have been dismissed by the prosecution in order to have prevented a gun issue from contaminating the jury prejudicially against the appellant. That the present mood of the public is such that with the gun charge against the appellant it could only find the appellant guilty on all charges levied against him irrespective of his valid defenses thereto. That the Government knew that the gun charge against the defendant would aid it to obtain a conviction against the appellant on the other counts in the indictment which were indeed referred to by the Court as presenting "a difficult case." (Tr. 92)

56 Am. Juris, pg. 986, para. 10; 30 Am. Juris(2), pg. 354, para. 1173. Further, no proof was presented that appellant was carrying a concealed weapon on his person. See: Wilson v. U. S., 91 U.S.App.D.C. 135, 198 S(2) 299.

II

IT IS HIGHLY IMPROPER FOR THE GOVERNMENT TO SEND EVIDENCE INTO A JURY ROOM BY WAY OF A COPY OF AN INDICTMENT

After the complete trial of the various issues, there was sent into the jury room a copy of the indictment against the appellant. That the indictment sent into the jury room spelled out the five various counts levied against the appellant and same constituted practically a charge in law against the defendant.

That there should not have been sent into the jury room a copy of the indictment as it in fact constitutes a form of evidence which was used against the appellant. That under no circumstances should a copy of the indictment have been sent into the jury room and if some reason it is deemed advisable to send such indictment into the jury room, the defendant should be afforded the equal opportunity in law to send in his written answer to each of the specific charges in the indictment. (The transcript does not show a copy of the indictment being sent into the jury room but it is,

nevertheless, represented to the Court that as a general practice this is done in the lower court as a matter of routine.)

III

CHARGES AGAINST APPELLANT, McMILLAN,
SHOULD HAVE BEEN TRIED SEPARATE AND
APART FROM CO-DEFENDANT, SHUMATE,
WHEN THE GOVERNMENT HAD EVIDENCE THAT
SHUMATE WAS AN AWOL SERVICEMAN

The evidence shows that the Government was prepared and had knowledge of the fact that Shumate was an AWOL serviceman. That Shumate should not have been tried with McMillan as Shumate, being an AWOL serviceman, placed the joint defendant, McMillan, in a prejudicial position and prevented him from receiving a fair trial. That there is a stigma attached to a serviceman being AWOL particularly if there was on the jury panel any x-serviceman. See: Gregory v. U. S., 369 F(2) 185 and Drew v. U. S., 118 U.S.App.D.C. 11; 331 F(2) 85.

IV

THE UNITED STATES GOVERNMENT SHOULD NOT GIVE
PROTECTION TO THOSE ENGAGED IN ADMITTED
ILLEGAL ACTIVITIES

The evidence shows that Haywood Smith, the person who was allegedly burglarized, was and had for some time previous to

May 12, 1968 been engaged in admitted illegal bootlegging activities. That the prosecution of the appellant for any alleged crime against Haywood Smith is in effect placing the Government in the position of giving protection to a lawbreaker. Assuming arguendo that the Government does wish to afford protection to those engaged in illegal activities such as Haywood Smith, the minimum requirement for a fair trial to the appellant would be to try the appellants, McMillan and Shumate, and Haywood Smith all together at one trial. This would then bring into sharp focus for the jury the caliber of the testimony of the prosecution's witnesses.

V

THE CLOSING ARGUMENT BY PROSECUTION WAS UNFAIR
AND PREJUDICIAL TO DEFENDANT AND REQUIRES
THIS COURT TO REVERSE THE GUILTY FINDING

McMillan produced an alibi witness, namely, Louise D. Campbell, who placed McMillan on a bus at the time of the alleged offenses with his arrival being from North Carolina to Washington, D. C. on Sunday, May 12, 1968, at 3:25 A. M. (Tr. 334). The Government in its closing argument unfairly sought to destroy the weight to be given to the alibi witness by stating "He (meaning McMillan) presented a lady here in the courtroom who is asleep in the courtroom right now." There is nothing in the evidence for

such remarks to have been made by the prosecution (Tr. 441). That such unwarranted comment about the alibi witness of McMillan was prejudicial to McMillan and demeaning to the alibi witness, Louise D. Campbell. See: White v. U. S., 248 A(2) 825.

VI

THAT THE ALLEGED IDENTIFICATION OF THE
APPELLANT WAS SO INADEQUATE THAT A MOTION FOR
ACQUITTAL SHOULD HAVE BEEN GRANTED BY
REASON OF THE INADEQUACY OF IDENTIFICATION

That the prosecution case was so weak that the Court should have granted a motion of acquittal on all counts to the defendant, McMillan. That one prosecution witness, Haywood Smith, stated that there were two white men and one colored man. That another prosecution witness, one common-law wife, Bettie L. Powell, who was allegedly with him during the entire time of the criminal acts, stated that there were two colored men and one white man. Further, both prosecution witnesses, Haywood Smith and Bettie L. Powell, admitted that their illegal operation required dim lights and that the premises were kept in such a dimly lighted fashion that identification of the appellant was so weak that due to the particular lighting conditions that a motion for acquittal should have been granted by the Court. See: Bailey v. U. S., Adv. Sht. U.S.App., #21-428,

decided March 7, 1969, and McRae v. U. S., Adv. Sht. U.S.App., #21 -980, decided July 10, 1969.

VII

THERE WAS INSUFFICIENT PROOF TO
ESTABLISH THE CRIME OF BURGLARY

The appellant was charged by indictment of entering without breaking the dwelling of Haywood Smith. The evidence in the case shows that allegedly the appellant was on his fourth invited visit to the premises of Haywood Smith, a bootlegger, when an alleged robbery took place. There is a total lack of evidence sufficient to establish burglary. The entrance onto the premises was not a trespass nor was the entrance onto the property a housebreaking. In fact the entrance onto the premises was shown to have been by invitation and that the door was in fact open.

Further, the indictment failed to allege the ownership of the dwelling house. Ownership of the house must be stated in an indictment for burglary for two reasons:

1. For the purpose of showing on the record that the house alleged to have been broken into was not the dwelling house of the accused, inasmuch as one cannot commit the offense of burglary by breaking into his own house, and

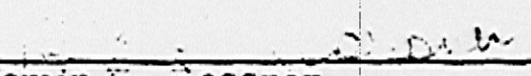
2. For the purpose of so identifying the offense as to protect the accused from a second prosecution for the same offense. If ownership is not known, allegation should be made as to the occupants of the premises and allegation must be made as to their exclusive possession, care and control of the structure and that the structure is the occupant's domical. If either ownership nor possession and control of the premises by Haywood Smith was made in the indictment. Conceivably, the premises were owned or occupied by Bettie L. Powell, so there does exist the possibility of the defendant being subjected to perhaps prosecution again for the same event.

The burglary charge in the indictment is fatally defective and the conviction thereunder should be reversed. See: 13 Am. Juris(2), pg. 342, para. 37.

CONCLUSION

Wherefore, this Court should reverse the judgment of the Trial Court and remand the case to the Trial Court with instructions to enter a judgment of acquittal on all counts.

Respectfully submitted,


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(Appointed by this Court)

September 2, 1969

CERTIFICATE OF SERVICE

Copy of the foregoing Brief for Appellant mailed, postage prepaid, this 8th day of September, 1969, to the United States District Attorney, United States Court of Appeals, United States Court House, Washington, D. C. 20001; Ray Russell, Esquire, 22 W. Jefferson Street, Rockville, Maryland; and, to Appellant, Robert L. McMillan, Box 25, Lorton, Virginia.

Benjamin F. Rossner

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,110

UNITED STATES OF AMERICA,

Appellee,

vs.

ROBERT L. McMILLAN,

Appellant.

SUGGESTION

~~PETITION~~ FOR REHEARING EN BANC

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 7 1970

Nathan J. Paulson
CLERK

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(Appointed by this Court)

STATEMENT OF QUESTIONS PRESENTED

1. Can a conviction of carrying a dangerous weapon be allowed to stand where there is no gun?
2. Can a conviction be allowed to stand when the Government purposely places into evidence facts to establish that one of the co-defendants was an AWOL serviceman at the time of the alleged crimes?
3. Should a judgment be allowed to stand when the closing argument by the prosecution was unfair and refers to a defense witness as the lady "who is asleep in the courtroom now"?

SUMMARY OF ARGUMENT

McMillan was tried together with Shumate and found guilty of (1) burglary, (2) robbery, (3) assault with a dangerous weapon (on Smith and Powell), and (4) carrying a dangerous weapon.

No gun was found on McMillan at anytime. (1) Unless he was carrying a gun, either openly or concealed, he cannot be guilty of violating 22 D. C. Code, Section 3204. (2) Unless it can be proven that the gun was loaded, he cannot be guilty of carrying a dangerous weapon.

Shumate was an AWOL serviceman (U. S. Army). The prosecution placed this highly prejudicial fact into the evidence causing the jury to discredit both Shumate and McMillan, who were tried together. The Appellate Court has reversed the conviction of Shumate and should now reverse the conviction of McMillan on the tainted evidence related.

The prosecution in closing argument unfairly attacked McMillan's witness by referring to her as the lady now "sleeping" in the courtroom.

SUGGESTION

PETITION BY McMILLAN FOR REHEARING EN BANC
FROM JUDGMENT OF JUNE 30, 1970

I

On June 12, 1968 Robert L. McMillan was indicted on the following counts: (1) First degree burglary (2) Robbery (3) Assault with a dangerous weapon (on Haywood Smith) (4) Assault with a dangerous weapon (on Bettie L. Powell) (5) Carrying a dangerous weapon.

He was tried together for these crimes with William A. Shumate. At the trial Robert L. McMillan did not testify. William A. Shumate did. Both were found guilty on all counts in the indictment.

On June 30, 1970 the U. S. Court of Appeals for the District of Columbia Circuit in No. 23,110 affirmed the judgment against McMillan and reversed the judgment against Shumate.

The decision of this Court only mentioned the counts of first degree burglary, robbery and assault with a dangerous weapon. The Court appears to have overlooked the count of carrying a dangerous weapon.

The Court in overlooking the count of carrying a dangerous weapon, therefore, did not consider the very salient fact that it was never established or shown that McMillan had a gun; and

whether or not it was concealed on his person.

A CONVICTION OF CARRYING A DANGEROUS
WEAPON CANNOT BE ALLOWED TO STAND WHERE
THERE IS NO CORPUS DELICTI

The appellant was charged by indictment with carrying a dangerous weapon. No gun was found on McMillan (or Shumate) at anytime. Also, no evidence was ever produced to show that the weapon was loaded or unloaded. The Government never at any time produced a weapon.

That the present mood of the public is such that with the gun charge against the appellant it could only find the appellant guilty on all charges levied against him irrespective of his valid defenses thereto.

That the Government knew that the gun charge against the defendant would aid it to obtain a conviction against the appellant on the other counts in the indictment which were indeed referred to by the Court as presenting "a difficult case." (Tr. 92). 56 Am. Juris, pg. 996, para. 10; 30 Am. Juris(2), pg. 354, para. 1173. Further, no proof was presented that appellant was carrying a concealed weapon on his person. See: Wilson v. U. S., 91 U. S.App. D.C. 135, 198 F(2) 299.

II

The Court in reversing as to Shumate held that the prosecution improperly injected into the trial the fact that Shumate was an AWOL serviceman. Allegedly, both McMillan and Shumate committed the crimes in the indictment together. When tried together, any improper and unquestionably prejudicial statement affecting either defendant would necessarily result in a verdict against both of them.

In the trial of McMillan and Shumate, the prosecution was wrongfully allowed to inject into the proceedings that Shumate had been absent from the U. S. Army without leave. With both being tried together for a crime supposedly jointly committed by them, such testimony would necessarily result in McMillan being found guilty.

CHARGES AGAINST APPELLANT, McMILLAN,
SHOULD HAVE BEEN TRIED SEPARATE AND
APART FROM CO-DEFENDANT, SHUMATE,
WHEN THE GOVERNMENT HAD EVIDENCE THAT
SHUMATE WAS AN AWOL SERVICEMAN

The evidence shows that the Government was prepared and had knowledge of the fact that Shumate was an AWOL serviceman. That Shumate should not have been tried with McMillan as Schumate, being an AWOL serviceman, placed the joint defendant, McMillan,

in a prejudicial position and prevented him from receiving a fair trial. That there is a stigma attached to a serviceman being AWOL particularly if there was on the jury panel any x-service man. See: Gregory v. U. S., 369 F(2) 185 and Drew v. U. S., 118 U.S.App.D.C. 11; 331 F(2) 85.

This Court has recognized the seriousness of the AWOL charge being placed into the evidence and has completely reversed the judgment of guilty against Shumate. Such evidence was equally harmful to McMillan.

III

McMillan produced an alibi witness who after testifying was subsequently referred to as the lady sleeping in the courtroom. That such reference was made in a deliberate attempt to discredit her testimony on behalf of McMillan.

THE CLOSING ARGUMENT BY PROSECUTION WAS UNFAIR AND PREJUDICIAL TO McMILLAN AND REQUIRES THIS COURT TO REVERSE THE GUILTY FINDING

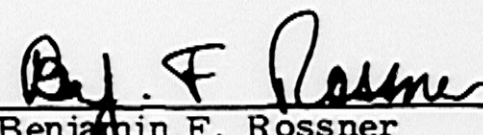
McMillan produced an alibi witness, namely, Louise D. Campbell, who placed McMillan on a bus at the time of the alleged offenses with his arrival being from North Carolina to Washington, D. C. on Sunday, May 12, 1968, at 8:25 A. M. (Tr. 334). The

Government in its closing argument unfairly sought to destroy the weight to be given to the alibi witness by stating "He (meaning McMillan) presented a lady here in the courtroom who is asleep in the courtroom right now." There is nothing in the evidence for such remarks to have been made by the prosecution (Tr. 441). That such unwarranted comment about the alibi witness of McMillan was prejudicial to McMillan and demeaning to the alibi witness, Louise D. Campbell. See: White v. U. S., 248 A(2) 825.

CONCLUSION

That this Court en banc reconsider its judgment of June 30, 1970 and reverse the judgment against Robert L. McMillan as it has done with William A. Shumate.

Respectfully submitted

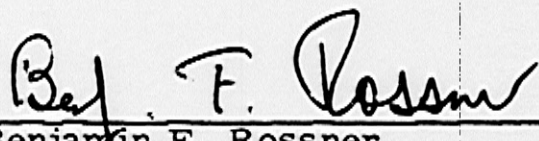

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July 7, 1970

CERTIFICATE OF SERVICE

Copy of foregoing hand delivered to United States Attorney.

Copies mailed to Robert L. McMillan, Box 25, Lorton, Virginia,
and to Raymond W. Russell, Esquire, 22 W. Jefferson Street,
Rockville, Maryland, on July 7, 1970.



Benjamin F. Rossner